Filed 8/25/04 Workmen's Auto Ins. v. Forlini CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

WORKMEN'S AUTO INSURANCE COMPANY, Plaintiff and Respondent, v. HUGO FORLINI et al., Defendants and Appellants.	F043676 (Super. Ct. No. 02-201644) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. John P. Moran, Judge.

Bourdette & Partners, Philip C. Bourdette and Allen Broslovsky for Defendants and Appellants.

Law Offices of Kurt Boyd, Kurt Boyd and Mark M. Mercer for Plaintiff and Respondent.

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Appellants Hugo and Lilli Forlini made claims for underinsured motorist coverage with their insurer, respondent Workmen's Auto Insurance Company (Workmen's). Workmen's filed a declaratory relief action seeking a court determination that the Forlinis were not entitled to underinsured motorist benefits under their Workmen's policy because underinsured motorist coverage "does not apply to any bodily injury until the limits of

bodily injury liability policies applicable to all insured motor vehicles causing the injury have been exhausted by payment of judgments or settlements" (Ins. Code, § 11580.2, subd. (p)(3)), and the Forlinis had not exhausted the limits of the bodily injury policy applicable to the vehicle with which the Forlinis' vehicle collided. The trial court agreed with Workmen's and granted the requested relief. The Forlinis appeal, and once again contend that they did exhaust the limits of the bodily injury liability policy applicable to the other car. As we shall explain, we agree with the trial court. We will affirm the judgment.

FACTS

A vehicle driven by Hugo Forlini collided with a vehicle driven by Isadoro Mendoza. The vehicle driven by Mendoza was owned by Rafael Ariaza. Hugo Forlini and his wife Lilli Forlini (who was a passenger in the Forlini vehicle at the time of the accident) sued Mendoza and Ariaza. Mendoza was never served with the complaint. Ariaza was insured by Viking Insurance Company (Viking). Hugo Forlini settled the action by accepting $15,000 and agreeing to release Ariaza, Mendoza and Viking from further liability. Lilli Forlini entered into an identical settlement, i.e., she accepted $15,000 and agreed to release Ariaza, Mendoza and Viking from further liability.

Hugo and Lilli Forlini then submitted an underinsured motorist claim to their own insurer, Workmen's Auto Insurance Company (Workmen's). Workmen's filed a declaratory relief action against the Forlinis. It sought a determination that "based on defendant(s) failure to exhaust the limits of liability available under [the Viking policy] by either settlement of, or judgment acquired in, the underlying action, defendants herein are not entitled to claim benefits under the underinsured motorist coverage of plaintiff's policy." Insurance Code section 11580.2 pertains to underinsured motorist coverage. Subdivision (p)(3) of that statute states that "[t]his coverage does not apply to any bodily injury until the limits of bodily injury liability policies applicable to all insured motor vehicles causing the injury have been exhausted by payment of judgments or settlements,

and proof of the payment is submitted to the insurer providing the underinsured motorist coverage." (Ins. Code, § 11580.2, subd. (p)(3).) The case was tried on a list of 32 "stipulated facts" presented to the trial court. Some of these we have already recited here. None of those 32 stipulated facts, however, expressly mentioned what the "limits of bodily injury liability" coverage were for the Viking policy covering the Ariaga vehicle.

The trial court ruled in favor of plaintiff Workmen's. The trial court's ruling stated in pertinent part: "Defendants having released their claims against Mendoza and the owner of the vehicle for $30,000, they, as a condition to recovering under the uninsured [*sic*] motorist coverage of plaintiff's policy, must prove by competent evidence that such sum represents the limits of the policy with respect to the liability of Mendoza and the owner of the vehicle. They have offered no competent evidence on this issue, the ordinary evidence of such limits being an authenticated copy of the policy."

The Forlinis moved for a new trial. No reporter's transcript of, or minute order pertaining to, the court's hearing on the Forlinis' motion for a new trial appears in the record presented to us on appeal. According to Workmen's however: "On May 20, 2003, the court heard defendants Motion for a New Trial, and granted an alternative request to augment the record, continuing the hearing to June 9, 2003. On June 4, 2003, defendants' counsel served their Submission of Newly Obtained Evidence, etc …." The Forlinis' "Submission of Newly Obtained Evidence," etc. does appear in the record on appeal. The "newly obtained evidence" submitted by the Forlinis was a copy of Ariaza's insurance policy. This is the policy the parties have referred to as the "Viking" policy, although we note that the name "Viking" does not seem to appear anywhere on the document. In any event, Workmen's appears to concede that the trial court could and did properly consider the document (which we will continue to refer to as the "Viking policy," as do the parties). The record on appeal does not contain any reporter's transcript of the June 9 hearing on the Forlinis motion for a new trial or any minute order

of the June 9 proceedings. It does contain a June 10, 2003, "Notice of Ruling on Motion for New Trial" which states that the court heard and denied the motion on June 9, and that "[n]o appearance was made on behalf of" the Forlinis at the June 9 hearing. The court entered judgment in favor of Workmen's on June 9, 2003. The judgment, like the trial court's earlier ruling, states that the Forlinis failed to exhaust the limits of liability available under the Viking policy.

APPELLANTS DID NOT DEMONSTRATE EXHAUSTION OF THE LIMITS OF THE VIKING POLICY

The parties do not contend that there is any factual dispute here. The Forlinis contend that as a matter of law the maximum amount they could obtain from Viking under the Viking policy was $30,000. Since they obtained that amount, they contend that they have exhausted the Viking policy. On appeal, we therefore undertake a de novo review of the trial court's determination, i.e., we apply the law to the undisputed facts. (See *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204 (*2004 Haynes*).)

The declarations page of the Viking policy shows that it contains bodily injury liability limits of "$50,000 Each Person" and "$100,000 Each Accident." The Forlinis do not dispute this. They argue that because Vehicle Code section 17151 limits the liability of an owner for bodily injury caused by a permissive user of the owner's vehicle to $15,000 per person and $30,000 per accident, this somehow translates into exhaustion of the Viking policy.[1] Like the trial court, we fail to see how appellants' conclusion follows

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[1] Vehicle Code section 17151, subdivision (a) states:

> "The liability of an owner, bailee of an owner, or personal representative of a decedent imposed by this chapter and not arising through the relationship of principal and agent or master and servant is limited to the amount of fifteen thousand dollars ($15,000) for the death of or injury to one person in any one accident and, subject to the limit as to one person, is limited to the amount of thirty thousand dollars ($30,000) for the death of or injury to

from appellants' premise. The Viking policy clearly covers the liability of a permissive user (here Mendoza, who was driving owner Ariaza's car). "Part I – Liability" of the Viking policy states: "We will pay damages for which any insured person is legally liable because of bodily injury and property damage caused by a car accident arising out of the ownership, maintenance or use of a car or utility trailer." Part I of the policy further states: "As used only in this Part, 'insured person' or 'insured persons' means: 1. You or a relative. 2. Any person using your insured car." The term "your insured car" is defined in the policy to include "Any car described on the Declarations Page …." The car driven by Mendoza and owned by Ariaza, a 1980 Dodge, is described on the declarations page. Indeed, the parties' stipulated fact No. 8 in this case is "[t]hat Isadora Mendoza was an insured person under Viking Insurance Company's policy AC6017883 as Rafael Araiza's [*sic*] permissive user." Thus it appears that the limits of bodily injury liability under the Viking policy for the liability of permissive user Mendoza were $50,000 per person and $100,000 per accident. Since Hugo and Lilli Forlini obtained $30,000 from Viking and not $100,000, the Forlinis did not exhaust the Viking policy.

Appellants also call our attention to Insurance Code section 11580.1, subdivisions (a) and (b), and to Vehicle Code section 16056, subdivision (a), but do not attempt to explain how these statutes would bar Viking from providing the $50,000/$100,000 bodily injury coverage for permissive user Mendoza.[2] Nor does the record contain any evidence

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> more than one person in any one accident and is limited to the amount of five thousand dollars ($5,000) for damage to property of others in any one accident."

[2] Vehicle Code section 16056, subdivision (a) states:

> "(a) No policy or bond shall be effective under Section 16054 unless issued by an insurance company or surety company authorized to do business in this state, except as provided in subdivision (b) of this section, nor unless

the policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than fifteen thousand dollars ($15,000) because of bodily injury to or death of one person in any one accident and, subject to such limit for one person, to a limit of not less than thirty thousand dollars ($30,000) because of bodily injury to or death of two or more persons in any one accident, and, if the accident has resulted in jury to, or destruction of property, to a limit of not less than five thousand dollars ($5,000) because of injury to or destruction of property of others in any one accident."

Insurance Code section 11580.1 states in part:

"(a) No policy of automobile liability insurance described in Section 16054 of the Vehicle Code covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be issued or delivered in this state on or after the effective date of this section unless it contains the provisions set forth in subdivision (b). *However, none of the requirements of subdivision (b) shall apply to the insurance afforded under the policy (1) to the extent that the insurance exceeds the limits specified in subdivision (a) of Section 16056 of the Vehicle Code*, or (2) if the policy contains an underlying insurance requirement, or provides for a retained limit of self-insurance, equal to or greater than the limits specified in subdivision (a) of Section 16056 of the Vehicle Code.

"(b) Every policy of automobile liability insurance to which subdivision (a) applies shall contain all of the following provisions:

"(1) Coverage limits not less than the limits specified in subdivision (a) of Section 16056 of the Vehicle Code.

"(2) Designation by explicit description of, or appropriate reference to, the motor vehicles or class of motor vehicles to which coverage is specifically granted.

"(3) Designation by explicit description of the purposes for which coverage for those motor vehicles is specifically excluded.

"(4) *Provision affording insurance to the named insured with respect to any owned or leased motor vehicle covered by the policy, and to the same extent that insurance is afforded to the named insured, to any other person using the motor vehicle, provided the use is by the named insured or with*

that Viking ever represented to the Forlinis or to anyone that Viking could not pay more than $30,000 on behalf of permissive user Mendoza, someone who the parties agree was an "insured person" under the Viking policy. Nor do the Forlinis contend that they were in any way prevented from serving Mendoza with their personal injury complaint and obtaining or attempting to obtain a judgment of $100,000 or more against him.

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his or her permission, express or implied, and within the scope of that permission…." (Italics added.)

In *Mid-Century Ins. Co. v. Haynes* (1990) 218 Cal.App.3d 737 (*1990 Haynes*), the court held that, "Insurance Code section 11580.1, subdivision (a), authorizes an insurer to limit insurance for permissive users to the limits set forth in Vehicle Code section 16056, subdivision (a), in situations where the named insured has obtained coverage in excess of the limits." (*Id*. at p. 738.) Nothing in Insurance Code section 11580.1, however, requires an insurer to limit coverage for a permissive user to the minimum $15,000 per person and $30,000 per accident amounts described in Vehicle Code section 16056, subdivision (a). We should also note here that the policy in *Haynes* provided limits of $50,000 per person and $100,000 per occurrence, but also stated: "'We will provide insurance for an insured person, other than you or a family member, up to the limits of the Financial Responsibility Law only.'" (*1990 Haynes, supra,* at p. 739.) The Financial Responsibility Law appears at Division 7 of the Vehicle Code (§§ 16000 et seq.), and includes Vehicle Code section 16056. The court also held that this language was sufficiently clear and unambiguous to limit the coverage for permissive users to the $15,000 per person and $30,000 per accident amounts described in Vehicle Code section 16056. This latter aspect of the case was expressly disapproved by the California Supreme Court in *2004 Haynes, supra,* 32 Cal.4th 1215, fn. 14. In the *2004 Haynes* case, the court found similar language attempting to limit a permissive user's coverage to $15,000 per person and $30,000 per accident (where the named insured had limits of $250,000 per person and $500,000 per occurrence) was not "sufficiently conspicuous, plain and clear to be enforceable." (*2004 Haynes, supra,* at p. 1202.) The *2004 Haynes* case also disapproved of *Hartford Casualty Co. v. Mid-Century Ins. Co*. (1994) 26 Cal.App.4th 1783 for the same reason. The *2004 Haynes* case did not, however, in any way disapprove the holding of the *1990 Haynes* case (repeated in 1994 in *Hartford Casualty Co. v. Mid-Century Ins. Co., supra*) that an insurer may limit coverage for a permissive user to the $15,000 per person and $30,000 per accident minimums of Vehicle Code section 16056. The *2004 Haynes* case simply pointed out that an insurer is "required to cast coverage restrictions in plain and clear language which [is] conspicuously displayed." (*2004 Haynes, supra*, 32 Cal.4th at p. 1215.)

Appellants rely on *1990 Haynes, supra,* 218 Cal.App.3d 737, and *Hartford Casualty Ins. Co. v. Mid-Century Ins. Co*., *supra,* 26 Cal.App.4th 1783. Neither of these cases help appellants. In the *1990 Haynes* case the court stated: "The sole issue on appeal is whether Insurance Code section 11580.1, subdivision (a), authorizes an insurer to limit the insurance for permissive users to the limits set forth in Vehicle Code section 16056, subdivision (a), in situations where the named insured has obtained coverage in excess of the limits. We conclude that it does." (*1990 Haynes, supra*, 218 Cal.App.3d at p. 738.) Appellants' opening brief makes no argument that the Viking policy contained any provision "to limit the insurance for permissive users to the limits set forth in Vehicle Code section 16056, subdivision (a)." (*1990 Haynes, supra*, 218 Cal.App.3d at p. 738.) Appellants' opening brief nowhere mentions any language whatsoever from the Viking policy. In *Hartford Casualty Ins. Co. v. Mid-Century Ins. Co., supra,* 26 Cal.App.4th 1783, the court stated: "In *Mid-Century Ins. Co. v. Haynes* (1990) 218 Cal.App.3d 737, we held that an insurer may limit coverage for a permissive user to $15,000, or the limits of the Financial Responsibility Law." (*Hartford Casualty Ins. Co. v. Mid-Century Ins. Co., supra*, 26 Cal.App.4th at p. 1787.) Again, although an insurer "may limit coverage for a permissive user to $15,000, or the Limits of the Financial Responsibility Law" (*ibid*), appellants made no showing that Viking actually did so limit its coverage for a permissive user.

In their reply brief, appellants argue for the first time that there is language in the Viking policy which limits Viking's exposure under the policy to the $30,000 Viking paid to appellants. We reject this argument for two reasons.

First, "points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before." (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) "'Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it

or require the effort and delay of additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for the failure to present them before.'" (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764; for other cases in accord, see also 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §616, at pp. 647-648.)

Second, even if we consider the argument on its merits, it fails. The Viking policy language called to our attention by the Forlinis in their reply brief states:

> "Conformity With Financial Responsibility Laws [¶] If we certify this policy as proof of compliance under any financial responsibility law, it will comply with that law to the extent of the coverage required by the law. You must reimburse us if we have to make a payment that we would not have had to make if this policy were not certified."

There is no evidence that Viking certified the policy as proof of compliance under any financial responsibility law. Thus appellants made no showing that this clause of the policy has any applicability to this case. Underinsured motorist coverage "does not apply to any bodily injury until the limits of bodily injury liability policies applicable to all insured motor vehicles causing the injury have been exhausted by payments of judgments or settlements …." (Ins. Code, § 11580.2, subd. (p)(3); in accord, see also *Hartford Fire Ins. Co. v. Macri* (1992) 4 Cal.4th 318, 327, and *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1057.) The Viking policy was not exhausted because each of the Forlinis obtained $15,000 in settlement with Viking, and did not exhaust the "$50,000 Each Person" bodily injury limit of liability.

Other Issues

Appellants raise two other issues, both of which are without merit.

First, they argue that "a new trial should be granted because the evidence was insufficient to justify the decision." It is not clear whether appellants are arguing that this court should grant them a new trial because the trial court's judgment was erroneous, or

that the trial court itself should have granted their motion for a new trial. Either way, the basis for the argument is appellants' premise that appellants did indeed demonstrate that they exhausted the limits of the Viking policy. As we have already explained, they did not. Thus, if appellants are arguing that we should reverse the judgment and remand the matter for a new trial, we cannot do so because appellants have shown no error. "'It is well settled that all presumptions and intendments are in favor of supporting the judgment or order appealed from, and that an appellant has the burden of showing reversible error, and that, in the absence of such showing, the judgment or order appealed from will be affirmed.'" (*Walling v. Kimball* (1941) 17 Cal.2d 364, 373.) If appellants are contesting the trial court's denial of their motion for a new trial, that ruling is reviewed for abuse of discretion. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872; *Sherman v. Kinetic Concepts, Inc*. (1998) 67 Cal.App.4th 1152, 1160.) The Forlinis' motion for a new trial argued that the evidence was insufficient to justify the decision (see Code Civ. Proc., § 657, subd. (6).) As we have already explained, the evidence was undisputed, and the only conclusion to be drawn from it is that appellants did not exhaust the limits of the Viking policy. The court thus did not abuse its discretion in denying the motion for a new trial.

Second, appellants argue that their "uninsured motorist claims are the subject of inconsistent and confusing rulings that need to be clarified." This is not accurate. There were no "rulings" pertaining to any uninsured motorist claim. Workmen's declaratory relief action sought a determination that "based on defendant(s) failure to exhaust the limits of liability available under VIKING INSURANCE COMPANY OF WISCONSIN'S policy …, defendants herein are not entitled to claim benefits under the underinsured motorist coverage of [Workmen's] policy." Workmen's obtained a judgment which made that exact determination. This case had nothing to do with any uninsured motorist claim. Appellants' argument appears to be based upon the court's inadvertent and obviously mistaken use of the word "uninsured" instead of

"underinsured" in the court's statement of decision quoted *ante* in the facts section of this decision. Even appellants' own opening brief on this appeal acknowledges, "[I]t therefore seems clear that the court was addressing Appellants' underinsurance claims, not their uninsurance claims." And this misnomer was so insignificant that appellants did not even mention it in their motion for a new trial.

DISPOSITION

The judgment is affirmed. Costs to respondent.

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Ardaiz, P.J.

WE CONCUR:

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Harris, J.

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Levy, J.